

Issues: Group I Written Notice (obscene language and disruptive behavior), Group II Written Notice (leaving work without permission) and Termination (due to accumulation); Hearing Date: 09/07/17; Decision Issued: 09/08/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11063; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11063

Hearing Date: September 7, 2017
Decision Issued: September 8, 2017

PROCEDURAL HISTORY

On June 8, 2017, Grievant was issued a Group I Written Notice of disciplinary action for use of obscene language and disruptive behavior. On June 8, 2017, Grievant was issued a Group II Written Notice of disciplinary action with removal for leaving the work site during work hours without permission.

On June 24, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 24, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 7, 2017, a hearing was held at the Agency's office. Grievant was notified of the hearing date, time, and location but did not appear at the hearing.

APPEARANCES

Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a DSP II at one of its facilities. Grievant had prior active disciplinary action. On January 10, 2016, Grievant received a Group I Written Notice. On January 13, 2016, Grievant received a Group II Written Notice.

On May 25, 2017, Grievant reported to work at approximately 3 p.m. She was assigned to work in a unit. She objected to the assignment and confronted the Charge Nurse. Grievant yelled and screamed. She said "f—k" and "sh-t" as she distracted other staff from their duties. Several of the Facility's residents heard Grievant and at least one became upset because of Grievant's outburst.

Grievant told another employee she was going to go home. The employee told Grievant she had to obtain permission from the Charge Nurse to leave. Instead of obtaining permission to leave from the Charge Nurse, Grievant left the Facility without completing her work shift. Only the Charge Nurse or a higher ranking manager could have authorized Grievant to leave the Facility.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Group I Written Notice

Use of obscene language is a Group I offense. Disruptive behavior is a Group I offense.² On May 25, 2017, Grievant was at the Facility and became distressed regarding her assigned work unit. She began yelling and said “f—k” and “sh-t” among other curse words. Her language was obscene. Her outburst was overheard by other staff who were distracted from their duties and by several residents at least one of whom became upset by Grievant’s behavior. Grievant’s behavior disrupted the Facility’s operations. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Group II Written Notice

Leaving the work site without permission is a Group II offense. On May 25, 2017, Grievant began her shift at 3 p.m. at the Facility and was expected to work until 11 p.m. She left the work site without obtaining permission from the Charge Nurse. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Accumulation

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has now accumulated two Group II Written Notices and one Group I Written Notice. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”³ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

³ *Va. Code § 2.2-3005.*

mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal based on the accumulation of disciplinary action is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.